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Supreme Court of the United States

OCTOBER TERM, 1991

SABINE RIVER AUTHORITY, *et al.*
Petitioners,

v.

UNITED STATES DEPARTMENT OF INTERIOR, *et al.*
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY OF PETITIONER TO RESPONDENTS' BRIEFS IN OPPOSITION

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BACKGROUND

Early in 1985, Petitioner, the Sabine River Authority (the "Authority"), publicly announced its intention to construct the Waters Bluff Reservoir ("Waters Bluff") along the Sabine River in Texas. Upon learning of the Authority's intentions, the Little Sandy Hunting and Fishing Club (the "Club"), owner of property that would have been subject to condemnation in building Waters Bluff, donated to the United States Fish & Wildlife Service ("FWS") a perpetual conservation easement over its property. Believing acquisition of the easement was subject to the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. 4321, FWS prepared an Environmental Assessment ("EA"). The EA concluded that the agency's action would not significantly affect the quality of the human environment. FWS deposited its acquired easement in the National Wildlife Refuge System thereby foreclosing the development of Waters Bluff.

ARGUMENT

The petition before this Court raises a simple question: Can the creation of a federal refuge ever warrant preparation of an environmental impact statement ("EIS") under NEPA? By answering this question in the negative, the lower courts have effectively exempted FWS's action and all other preservation actions from NEPA. (*See* Fifth Cir. Opinion, App. A at 22a (Where "land is earmarked as a wildlife habitat and migratory bird refuge . . . this intended 'use' . . . has no significant environmental impact.")).

The Government argues that the Authority has overstated the effect of the lower court rulings. (Fed. Defs. Opp. at 8). It points to the EA prepared by FWS as evidence that preservation actions *per se* do not fall outside the parameters of NEPA. (Fed. Defs. Opp. at 11, n.5). Yet the rulings below extend much further than the Government is willing to admit. The plain holding below is that a pure preservation action, such as where "land is earmarked as a wildlife habitat and migratory bird refuge" by definition will never impact environmental concerns for purposes of NEPA. (App. A at 22a). This holding creates by fiat a categorical exclusion to NEPA for preservation acquisitions of the type taken by FWS here. There can be no doubt that more acquisitions will take place in the future, in Texas and elsewhere across the nation. The decisions below exempt future similar acquisitions from NEPA thereby allowing such acquisitions to proceed unbeknownst to the general public and without input from other interested parties. While an EA was prepared in this case, the holdings below do not even ensure this minimum level of NEPA review.

The government continues, as it has in the past, to argue that the EA was properly considered and upheld by the lower courts. The decisions below, however, turn on the threshold question of whether NEPA applies in any measure to pure preservation actions. Concluding that it does not, there was little reason to scrutinize the EA; thus, the lower courts did not do so.[1] The government claims that this Court need

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[1] Admittedly, the district court engaged in review of the EA. Whenever, however, it faced an unavoidable defect in the EA, it reverted to its threshold determination that since NEPA did not apply in the first instance the EA, flawed or otherwise, was

not decide whether NEPA applies to this case, because if any NEPA mandate did exist, it was discharged by the EA. (Fed. Defs. Resp. at 11 n.5). At the same time, however, the EA's flaws are excused by claiming that the EA was gratuitous because NEPA did not apply to begin with. (*See, e.g.*, App. B at 48a-49a) (FWS failure to consider controversial, precedential and cumulative effects excused because FWS's action beyond NEPA's scope anyhow). The circuity of this argument leaves no doubt as to the underlying holding of this case, namely that preservation actions, of the sort taken by FWS, are exempt from NEPA. Not only are the lower courts' rulings on the adequacy of the EA secondary, but these rulings cannot fairly be described as having been rendered independent of the court's predisposition that NEPA was inapplicable in the first instance.

The categorical exemption to NEPA created by the courts below rests on their misapplication of *Metropolitan Edison v. People Against Nuclear Energy*, 460 U.S. 766 (1983). According to the Fifth Circuit, NEPA applies only where the federal action at issue is "proximately related to a change in the physical environment." (App. A at 21a) (citing, *Metropolitan Edison*, 103 S.Ct. at 1561). As the federal action in this case, the taking of a conservation easement, does not directly or immediately change the physical environment of the Club property, under the lower court's reading of *Metropolitan Edison*, NEPA does not apply.

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merely gratuitous. (Petition at 5). The court of appeals did not independently review the EA.

The Petition before the Court has been filed to remedy a critical misreading and misapplication of *Metropolitan Edison*. *Metropolitan Edison* does not limit NEPA's application to federal actions that themselves cause a change to the physical resources affected. The focus of *Metropolitan Edison* is not on the federal action but rather on its possible *effects* and whether these *effects* might change the physical environment. However, the character of the federal action that is the source of these effects has no bearing on NEPA's applicability.[2] It makes no difference under NEPA whether the federal action is as visceral as the lumbering of a forest or as ephemeral as the signing of report. Either will be subject to NEPA, depending on whether the potential *effects* of the action may significantly affect the quality of the environment. That is to say, whether the effects may change the physical environment.

The Authority is not seeking to distinguish *Metropolitan Edison*, as is claimed by the government (Fed. Defs. Opp. at 8 n.2), but rather to have the case correctly applied to these facts. The Authority claims that a potential effect of the government's easement acquisition is a water shortage in east Texas. As required by *Metropolitan Edison*, this ef-

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[2] The lower courts were not merely sympathetic to the environmental character of the government's easement acquisition. They were convinced that application of NEPA to a perceived pro-environmental action, such as the taking of a conservation easement, would be incongruous with the statute's purpose. (App. A at 38a.). By injecting into the NEPA process a substantive bias in favor of preservation, the decisions below are inconsistent with the "outcome neutral" application of NEPA to all major federal actions, regardless of their character. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

fect would result in change in the physical environment. The difficulty from the outset of this litigation has been the fact that the government's action - the taking of a conservation easement - does not directly or immediately change the physical environment. Based on the lower courts' reading of *Metropolitan Edison*, this fact alone has been dispositive in taking the Authority's claim beyond NEPA's reach.

The Authority additionally argues that the duty of a federal agency to consider the potential physical effects of its action, notwithstanding the non-physical character of the action itself, follows from its duty to consider environmental risks of the action. The government agrees that an agency must account for "unexpected but potential physical environmental changes (*i.e.*, environmental risks) flowing directly from its actions, such as the risk of an accident incidental to operating a nuclear power plant. . . ." (Fed. Defs. Opp. at 8) (citing *Metropolitan Edison*, 460 U.S. at 775 & n.9). But then it goes on to say that the risk of a water shortage, as identified by the Authority, would not arise from the easement acquired by the government. (Fed. Defs. Opp. at 8). This is so, despite the easement having been acquired specifically to thwart development of a reservoir designed to serve water needs. Rather, the government continues, a water shortage would be realized only if certain exogenous, intervening factors were to occur. (Fed. Defs. Opp. at 8-9).

The government's arguments as to exogenous factors are spurious. The existence of uncertain exogenous factors is what distinguishes risks from certainties. While the government concedes that risks must be evaluated, it would only have its easement

acquisition evaluated under NEPA if a water shortage was a certainty. However, NEPA does not only require evaluation of effects that are certain, but also requires evaluation of significant risks. *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 100 (1983); 40 C.F.R. § 1508.27(b)(5)(The "significance" of a major federal action depends in part on "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique and unknown risks.").

The "exogenous factors" to which the government alludes, and other similar concerns, are precisely the factors it should have addressed in an EIS when acquiring the Club easement. It was plain to the government that its action would preclude a planned reservoir. It is self-evident that such action might adversely affect local water supply. An EIS should have been prepared to analyze these potential effects.

For these reasons and the reasons stated in the Authority's petition, the Authority urges the Court to rule that potential adverse environmental effects of FWS's action, particularly the risk of a water shortage should be considered under NEPA, notwithstanding the "preservation" character of the action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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